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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 OBESITY RESEARCH  
12 INSTITUTE, LLC,

13 Plaintiff,

14 v.

15 FIBER RESEARCH  
16 INTERNATIONAL, LLC,

17 Defendant.

Case No.: 15-cv-0595-BAS-MDD

**ORDER ON JOINT MOTION TO  
DETERMINE DISCOVERY  
DISPUTE RE: WHETHER THE  
HOFFMAN REBUTTAL REPORT  
SHOULD BE STRICKEN**

**[ECF NO. 80]**

18 BACKGROUND

19 Before the Court is the Joint Motion to Determine a Discovery Dispute,  
20 filed on December 16, 2015, regarding whether the rebuttal expert report of  
21 Rick Hoffman, served by FRI, should be stricken as improper rebuttal to the  
22 initial expert report of Neil J. Beaton, a damages expert, served by ORI.  
23 (ECF No. 80). To say that this dispute is much ado about nothing is more  
24 than apt. ORI's Beaton report expresses no opinion whatsoever, stating only:  
25 "FRI has produced no documents at this time that would allow an analysis or  
26 calculation of profits." (ECF No. 80-2 at 6 (throughout the Court will refer to

the pagination provided by ECF rather than the original pagination)). Similarly, FRI's Hoffman rebuttal report expresses no opinion stating: "At this point, I do not have the financial and/or accounting information that is typically gathered by damage experts in matters such as this. Specifically, for the damage claims in this case, I need to have financial information from [ORI]." (ECF No. 80-2 at 24).

Against this non-backdrop, the Court will express an opinion, as follows:

### LEGAL STANDARD

Fed. R. Civ. P. 26(a)(2) governs the disclosure requirements regarding experts a party may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. Retained experts must provide a written report which "must contain . . . a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). A disclosure under this subsection must be supplemented "if the party learns that in some material respect the disclosure . . . is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(a)(2)(E) and 26(e)(1)(A). For retained experts, this supplementation must occur prior to the time the party's pretrial disclosures are due. Fed. R. Civ. P. 26(e)(2).

### ANALYSIS

It is a matter for the district court, upon proper motion, to decide whether the expert non-opinion of Mr. Beaton is relevant, admissible and qualified expert testimony on any issue in this case. Rules 703 – 705 of the Federal Rules of Evidence clearly contemplate an expert witness actually

1 presenting an opinion. It is highly unlikely that Mr. Beaton will be permitted  
2 to testify and present his expert non-opinion based upon nothing. Assuming  
3 that his testimony is allowed, Mr. Beaton would be limited to the non-opinion  
4 expressed in his report at trial. There would nothing for Mr. Hoffman to  
5 rebut in testimony.

6 The reports at issue here suffer similarly. Mr. Beaton, having  
7 expressed no opinion, presents nothing for Mr. Hoffman to rebut. Not  
8 surprisingly, Mr. Hoffman's rebuttal report also expresses no opinion.  
9 Neither party, in the joint memorandum of points and authorities submitted  
10 in connection with this joint motion, addresses the fact that neither report  
11 expresses an opinion. (*See* ECF No. 80). To the extent that ORI is  
12 suggesting that by expressing the same opinion as Mr. Beaton, that is, no  
13 opinion, Mr. Hoffman's rebuttal report is not proper rebuttal, that specious  
14 argument will not be considered by the Court. If pressed, the Court would  
15 strike both reports for failing to include an expert opinion under Rule  
16 26(a)(2)(B)(i).

17 Mr. Hoffman, however, presented in his report the methodology he  
18 would use to form an opinion if he was to do so. (ECF No. 80-2 at 25-28). Mr.  
19 Beaton, in his report, did not explain the methodology he would use. (*Id.* at  
20 6-7). ORI is correct that the portion of the Hoffman report providing a  
21 methodology for how he would proceed to an opinion goes beyond what was  
22 presented in the Beaton report. Mr. Beaton did not present any methodology  
23 that he would use if he was to proceed to an opinion. Accordingly, and  
24 probably meaninglessly, the portion of the rebuttal report of Mr. Hoffman,  
25 pertaining to the various methodologies he might employ, from line 37 to line  
26 125 is stricken.

1 In the event that ORI lawfully supplements the Beaton report, FRI will  
2 have the opportunity to supplement the Hoffman report with proper rebuttal  
3 information. In that regard, considering the seeming inability of counsel in  
4 this case to cooperate with each other, the Court will restrict the time within  
5 which these supplementations may occur. The Court intends to avoid the  
6 necessity of having to extend the pretrial disclosure and other pretrial  
7 deadlines due to a last minute supplement of the Beaton report.

8 Rule 26(e)(2) normally permits the parties to supplement written expert  
9 reports, if incorrect or incomplete, no later than the day that pretrial  
10 disclosures are due, currently June 20, 2016. Instead, under the  
11 circumstances presented in this case, ORI may supplement the Beaton report  
12 at any appropriate time but no later than one week following the close of  
13 discovery. Discovery is set to close on February 29, 2016. FRI may  
14 supplement the Hoffman rebuttal report no later than two weeks following  
15 service of Beaton's supplemental report. Any depositions of Messrs. Beaton  
16 and Hoffman must be completed no later than thirty days following service of  
17 the Beaton supplemental report.

### 18 CONCLUSION

19 The Court ORDERS that:

- 20 1. Lines 37 – 125 of the rebuttal expert report of Rick Hoffman are  
21 stricken as improper rebuttal.
- 22 2. Any supplement of the initial expert report of Mr. Beaton by ORI,  
23 within the meaning of Rule 26(e), must be served at any appropriate  
24 time but no later than one week following the close of discovery.
- 25 3. Any rebuttal supplementation by FRI of the rebuttal expert report of  
26 Mr. Hoffman, within the meaning of Rule 26(a)(2)(D)(ii), must be

1 served no later than two weeks following service of the Beaton  
2 supplemental report.

- 3 4. Any expert depositions of Messrs. Beaton and Hoffman, based upon  
4 satisfactory supplemental reports, must be completed no later than  
5 thirty days following service of the supplemental expert report of Mr.  
6 Beaton.

7 **IT IS SO ORDERED:**

8 Dated: December 17, 2015

9   
10 Hon. Mitchell D. Dembin  
11 United States Magistrate Judge  
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